

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ABNER DEWAYNE COLLINS,  
Deceased; et al.,

Civil No. 02-3054-CO

Plaintiffs,

FINDINGS AND RECOMMENDATION

v.

JACKSON COUNTY; et al.,

Defendants.

COONEY, Magistrate Judge:

This matter came on for hearing at the direction of the Honorable Ann Aiken, who, in reviewing the undersigned's ruling on summary judgment filed by defendants, directed this court to consider plaintiffs' request to file additional materials which plaintiffs had failed to incorporate into their opposition to defendants' summary judgment motion.

The court, having considered the matter fully, declines to consider the materials now supplied by plaintiffs, and again urges the district court to adhere to the previous Findings and Recommendation granting defendants' motion for summary judgment and entering judgment (#153 Findings and Recommendation).

In the movant's reply brief, defendants clearly placed plaintiffs on notice of the deficiencies in their filings. Apparently, plaintiffs, even now, fail to understand Local Rule

56.1 and its contents, including the provision stating that the court has no obligation to independently search the record not referenced in the concise statement by either party. The court exercised leniency toward plaintiffs by, over objection by defendants, allowing plaintiffs' evidence filed days after their response to defendants' summary judgment motion. The court further considered plaintiffs' submitted evidence, reviewing all evidence cited by plaintiffs in their response brief and cited by counsel at the telephone hearing on the motion in support of their opposition to defendants' motion. Granting the request of plaintiffs would result in plaintiffs having "two bites of the apple," one before, and one after, the Magistrate's ruling. No federal rule contemplates this result. Plaintiffs had ample opportunity to submit their evidence and was reminded to do so by defendants.

### **RECOMMENDATION**

Based on the foregoing, it is recommended that plaintiffs' request included in their Objection to Findings and Recommendation to file additional materials, consisting of a new response to defendants' concise statement of facts, a new plaintiffs' concise statement of facts, and attached evidence including new exhibits with new numbers, should be denied; and, as recommended in the undersigned's Findings and Recommendation filed November 14, 2005 (#153), that defendants' motion for summary judgment (#101) be granted, and that judgment be entered dismissing plaintiffs' first through sixth claims with prejudice and dismissing plaintiffs' seventh pendent state claim without prejudice.

***This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals.*** Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment

or appealable order. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have ten days within which to file a response to the objections.

Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this \_\_\_\_14\_\_\_\_ day of February, 2006.

\_\_\_\_\_/s/\_\_\_\_\_  
UNITED STATES MAGISTRATE JUDGE